Sun Microsystems (M) Sdn Bhd v KS Eminent Systems Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D8–28–252 OF 2000
ABDUL HAMID MOHAMAD J
17 JULY 2000

Companies and Corporations — *Winding up — Notice of intention to appear — Whether respondent company must file notice — Whether requirement to give notice is applicable to petitioner and respondent — Company (Winding-Up) Rules 1972 r 28 — Companies Act 1965 s 221(2)*

When the winding-up petition came up for hearing, the petitioner raised a preliminary objection to prevent the respondent from appearing at the hearing on the ground that the respondent had not served a notice of intention to appear.

Held, dismissing the preliminary objection:

(1) Service of notice of intention to appear is required by r 28 of the Company (Winding Up) Rules 1972 ('the Rules') and a respondent who fails to serve the notice on the petitioner is not allowed to appear to oppose the petition. However, the clause 'any person who has given notice that he intends to appear on the hearing of the petition' in s 221(2) of the Companies Act 1965 ('the Act') refers only to 'any person' and not the petitioner or the company (the respondent). This means that the requirement to give the notice is not applicable to the petitioner nor the respondent and as the Rules are made under the Act, it should be read subject to the Act (see pp 567D–E, 568G–H).

(2) Form 8 clearly mentions 'creditor' or 'contributory' because up to that stage, they are not parties to the proceedings and are most likely people who would like to appear on the hearing of the petition. On the other hand, the respondent, in most cases, would appear as he is already a party. Moreover in the present case, the respondent had already file the affidavit in opposition of the petition which clearly showed his intention to appear at the hearing to oppose the petition. Thus, there was no necessity to give notice anymore (see pp 568H–569A).

[Bahasa Malaysia summary

Ketika petisyen penggulungan timbul untuk perbicaraan, pempetisyen telah menimbulkan satu bantahan awal bagi menghalang responden daripada hadir di perbicaraan atas alasan bahawa responden tidak menyerahkan satu notis mengenai niat untuk hadir.

Diputuskan, menolak bantahan awal tersebut:

(1) Serahan notis bagi tujuan kehadiran adalah perlu mengikut k 28 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah tersebut') dan seorang responden yang gagal untuk menyerahkan notis tersebut ke atas pempetisyen tidak dibenarkan hadir untuk membantah petisyen tersebut. Namun begitu, klausa 'sesiapa yang telah memberikan notis bahawa beliau bertujuan untuk hadir di perbicaraan petisyen tersebut' dalam s 221(2) Akta Syarikat 1965 ('Akta tersebut') merujuk hanya kepada 'sesiapa' dan bukan pempetisyen atau syarikat tersebut (responden). Ini bermaksud bahawa keperluan untuk memberikan notis tersebut tidak terpakai kepada pempetisyen mahupun responden dan memandangkan Kaedah tersebut diperbuat di bawah Akta tersebut, ia hendaklah dibaca tertakluk kepada Akta tersebut (lihat ms 567D–E, 568G–H).

(2) Borang 8 jelas menyebut tentang 'pemiutang' atau 'penyumbang' kerana setakat peringkat tersebut, mereka bukan pihak kepada prosiding dan kemungkinan besar merupakan orang yang akan ingin hadir untuk perbicaraan petisyen tersebut. Sebaliknya, responden, dalam kebanyakan kes, akan hadir kerana telahpun menjadi satu pihak. Tambahan pula di dalam kes ini, responden telahpun memfailkan afidavit membantah petisyen yang dengan jelas menunjukkan niat beliau untuk hadir di perbicaraan untuk membantah petisyen tersebut. Oleh itu, tidak ada keperluan untuk memberikan apa-apa notis lagi (lihat ms 568H–569A).]

Notes

For a case on notice of intention to appear, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 788.

Cases referred to

Mitsuo Nagamura v Aero Works (Melaka) Sdn Bhd [1996] 4 MLJ 209 (refd)

Legislation referred to

Companies Act 1965 ss 218, 221(1), 221(2)
Companies (Winding Up) Rules 1972 rr 28, 28(2)
Rules of the High Court 1980

Chew Kherk Ying (*Wong & Partners*) for the petitioner.
SK Liow (*Kalpana Chandran* with him) (*Liow & Co*) for the respondant.

Abdul Hamid Mohamad J: The petitioner filed this winding-up petition on 23 March 2000. It is a petition under s 218 of the Companies Act 1965. The ground is that the respondent is insolvent or unable to pay its debt. The petition was first fixed for hearing on 8 June 2000 but the date was changed

A to 22 June 2000, due to court vacation. On 31 May 2000, the respondent filed an affidavit in reply. On 5 June 2000, the petitioner filed another affidavit replying to the respondent's affidavit.

On 16 June 2000, the petitioner filed a notice of motion for the appointment of one Lim Tian Huat as liquidator if the winding up order is B made.

On 19 June 2000, the respondent filed a summons in chambers for leave to file an affidavit in reply to the petitioner's affidavit filed on 5 June 2000.

On 22 June 2000, the petition came up for hearing. Learned counsel for C the petitioner raised a preliminary objection to prevent the respondent from appearing at the hearing. The ground was that the respondent had not served a notice of intention to appear.

That such a notice is not served or filed in court by the respondent is not disputed. However the issue is whether the respondent is required to serve such a notice before the respondent is allowed to appear at the hearing D of the petition to oppose it.

I was shown a judgment of Abu Samah JC (as he then was) in the case *Mitsuo Nagamura v Aero Works (Melaka) Sdn Bhd* [1996] 4 MLJ 209. The learned judicial commissioner (as he then was) held that a respondent in a winding up petition was not exempted from serving the notice of intention E to appear as required by r 28 of the Companies (Winding Up) Rules 1972. In other words, a respondent who fails to serve the notice on the petitioner is not allowed to appear to oppose the petition.

I adjourned my decision and asked both learned counsel to do further research on the issue. I now give my decision.

F I think I should start with the Companies Act 1965 under which the Companies (Winding-Up) Rules 1972 are made. Section 221(2), inter alia, provides:

> The court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or *any person who has given notice that he intends to appear on the hearing of the petition* .... (Emphasis added.)

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That subsection goes on to talk about the directions that the court may give. True that that subsection talks about what directions the court may give and is therefore not directly relevant to the present discussion. But, it should be noted that the clause 'who has given notice that he intends to appear on the hearing of the petition, refers only to 'any person' and not the petitioner or H the company (respondent). True that it cannot apply to the petitioner. But, it is also clear that the clause does not apply to the company (the respondent). Otherwise it would not have been drafted that way.

Now we come to the rule in question, r 28 of the Companies (Winding Up) Rules 1972:

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> (1) Every person who intends to appear on the hearing of a petition shall serve on the petitioner or his solicitor notice of his intention. The notice shall be signed by the person or by his solicitor and shall give the address

of the person signing it and shall be served or if sent by post shall be posted in such time as in ordinary course of post to reach the address not later than 12.00 o'clock noon of the day previous to the day appointed for the hearing of the petition.

(2) The notice may be in Form 8 with such variations as circumstances may require.

(3) A person who has failed to comply with this rule shall not, without special leave of the court, be allowed to appear on the hearing of the petition.

Form 8 provides:

No 8
(Rule 28)

NOTICE OF INTENTION TO APPEAR ON PETITION

(Title)

(a) State full name, or if a firm, the name of firm and address.
(b) State number and class of shares held.
(c) To be signed by the person or his solicitor.

TAKE notice that AB; of (a) creditor for RM... ... of (or contributory holding (b) ... ... shares in) the above company intends to appear on the hearing of the petition advertised to be heard on the ... day of ... ..., 19 and to support (or oppose) such petition.

(Signed) (c) [Name of person or firm]
(Address)

To ... ...

It goes without saying that Rules made under an Act should be read subject to the Act. Under s 221(1) of the Act, it is clear that the clause 'any person who has given notice that he intends to appear on the hearing of the petition' does not refer to the petitioner or the company (respondent). That same clause is repeated in r 28. Surely, it has to be read in the light of the provision in the Act.

Secondly, Form 8 clearly mentions 'creditor' 'or contributory'. They, up to that stage are not parties to the proceedings and are the most likely people who would like to appear on the hearing of the petition. Surely the respondent, in most cases, would appear. But, the respondent is already a party. In this case, the respondent has already filed an affidavit opposing the petition. The petitioner already knows that the respondent wants to appear on the hearing of the petition. Otherwise the respondent would not have

filed the affidavit in opposition of the petition. So, in the case of a respondent, there is no necessity to give notice anymore.

The provision in r 28(2) that the notice may be varied as circumstances may require is not a valid argument for saying that the form envisages a variation to include the respondent. If the respondent is required to give the notice, the respondent, being the original party besides the petitioner, should be the first to be mentioned.

It is important to note that the procedure in a winding-up proceeding as provided by the Companies (Winding Up) Rules 1972 is different from the procedure in a writ action as provided by the Rules of the High Court 1980. In a winding-up proceeding, the procedure is simple and brief. That is what it is meant to be. When a petition is filed, the senior assistant registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg serving, gazetting and advertising, before the hearing date. The petition is to be heard on the date fixed for hearing.

On the other hand, in a writ action upon filing no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:

> We command you that within eight days after the service of this writ on you, inclusive of the day of such service, *you do cause an appearance to be entered for you* at the suit of ... ... and take notice, that in default of you so doing the plaintiff may proceed therein to judgment and execution. (Emphasis added.)

The trial date is a long way off. Indeed, there may not be one at all.

It is important that procedure applicable in a writ action should not be incorporated into a winding-up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleading, the plaintiff should apply for direction and ask for the case to be set down for trial. In other words, he asks for a trial date. That is not necessary in a winding-up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for direction, setting down for trial etc in a winding up proceeding.

Learned counsels for the respondent have, in their written submission, referred to a number of text books regarding the 'English position' and the 'Indian position'. They all seem to say that the requirement to give the notice is not applicable to the respondent company. Of course opinions of learned authors in other jurisdictions are of assistance to the court, provided that the law in those countries are the same as ours. I am grateful to them for the extensive research that he has done. But, I do not think it is necessary for me to refer to them. The provisions of our law is clear enough. It is more so if we keep the winding-up procedure separate from the procedure in a writ action and not be influenced by the latter.

For these reasons and with respect, I regret that I am unable to agree with Abu Samah JC (as he then was) in *Mitsuo Nagamura*'s case. I am of the view that the respondent is not required to serve the notice to be entitled to appear and be heard on the hearing of the petition. The preliminary objection is dismissed with costs.

Preliminary objection dismissed

Reported by Wong Siok Chin